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Supreme Court of the United States

No. 599

McCORMICK & CO., INC., AND DURHAM BROS. CO., INC., *Appellants,*

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA ET AL, *Appellees.*

BRIEF ON BEHALF OF APPELLEES

H. B. LEE, *Attorney General,*
R. DENNIS STEED, *Asst. Atty. General,*
W. G. BROWN,
Counsel for Appellees.

JARRETT PRINTING CO., CHARLESTON, W. VA.

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BRIEF ON BEHALF OF APPELLEES, W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, AND HOWARD B. LEE, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA.

HISTORY OF THE CASE.

This is a suit in equity in which Appellants presented their verified bill of complaint to Hon. George W. McClintic, Judge of the Southern District of West Virginia, on the 24th day of December, 1930, and were granted a temporary restraining order against Appellees, enjoining them from requiring permits from Appellants authorizing the sale and transportation into the State of West Virginia of all alcoholic products of said Appellants defined and classified as liquors under the laws of said State.

The district court ~~erred in refusing~~ refused to enjoin the defendants, W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, from requiring, or attempting to require by legal or equitable process, or otherwise, the appellants in this cause and those on whose behalf they sue, to secure permits from the appellee, W. G. Brown, Commissioner of the State of West Virginia, and to pay for said permits.

STATEMENT OF ISSUE.

The issue presented by the pleadings in this case is whether the appellee, the State Commissioner of Prohibition of West Virginia, can, under the laws of the State, require appellants and other wholesale dealers in liquors as defined by the laws of said State to obtain permits for

the sale and transportation thereof before selling and transporting such products in West Virginia. Appellants assert the right to sell and transport these products in the State of West Virginia by virtue of federal permits to manufacture and sell certain alcoholic preparations, issued under the provisions of the National Prohibition Act, and urge the protection of the interstate commerce laws. Appellees deny that said federal permits authorize such sale and transportation of these alcoholic products denounced as liquors by the laws of West Virginia, and deny that same are legitimate articles of interstate commerce under the laws of said State; and insist that they can be lawfully sold and shipped into the State only under the laws and regulations of said State and for the uses and purposes authorized by said laws.

STATEMENT OF FACTS.

Appellees do not accept the "Statement of Facts" in brief of appellants, and respectfully submit the following:

The appellants are non-resident wholesale dealers in certain alcoholic preparations defined as "liquors" by the prohibition laws of West Virginia. (R. 27, 1st and 3rd Reg.) It is admitted in answer of appellees (R. 23) that appellants are holders of federal permits authorizing them under certain rules and regulations to manufacture, transport and sell certain products containing ethyl alcohol.

Under the rules and regulations prescribed by appellee, the State Commissioner of Prohibition of West Virginia, appellants as such wholesale dealers are required to obtain permits from said Commissioner authorizing them to sell and transport liquors, as defined by the prohibition laws of said State, for medicinal, scientific, pharmaceutical and mechanical purposes, before transporting and selling same in said State (R. 28, "Third-

Wholesale Dealer''), and to pay the fee of $50.00 for the calendar year (R. 33, ''Thirteenth - Fees Collected''). *Only such alcoholic products as are intoxicating in fact and ''which will produce intoxication,'' as determined by the Commissioner, and are placed in Class ''B'' and Class ''C'' in ''Ruling Number Five (R. 20), require permits for their transportation and sale in said State.*

No distinction is made between resident and non-resident dealers under the rules and regulations made and prescribed by appellee, State Commissioner of Prohibition (R. 27-35); and no permit is required by said Commissioner to purchase, sell or offer for sale any flavoring extracts, toilet articles, perfumes or other merchandise containing ethyl alcohol, unless and until such alcoholic preparation has been duly determined by said State Commissioner of Prohibition to be ''a liquid, mixture, or preparation which will produce intoxication,'' and has been placed in ''Class B'' (Sold by the Drug Trade only Under Permit), or in ''Class C'' (Sold by all dealers under permit), according to the latest Prohibition Department Ruling. (R. 19.)

Permits are required only of *resident* manufacturers, and non-resident manufacturers only as they transact business in the State as wholesale dealers.

The affidavit of T. A. Borradaile, Chemist, (R. 48) proves that certain of the alcoholic products of appellant, McCormick & Co., Inc., offered for sale in the State of West Virginia, and for which permit is required, will produce drunkenness and are intoxicating in fact. The affidavits of James M. Doran (R 37), G. F. Beyer (R. 42), Robert B. Lewis (R. 44), Ray Yancey (R. 45), and John Glassford (R. 44), do not controvert the statement of Chemist Borradaile. The affidavit of John W. Herscher (R. 43) is contradicted by Rules and Regulations of the Commissioner (R. 27).

The affidavit of Willoughby M. McCormick (R. 48) does not show the value of the alcoholic products sold in the State of West Virginia *under permit*. The amount of $13,000 includes sales of all alcoholic preparations by said appellant, the greater portion of which is not under permit.

OUTLINE OF ARGUMENT.

I. Under its police power the State has always had the authority to regulate or prohibit the traffic in liquors, subject to the limitations of interstate commerce laws.

Eberle v. *Michigan*, 232 U. S. 700, 58 L. ed. 803.
Purity Extract etc. Co. v. *Lynch*, 226 U. S. 192, 57 L. ed. 184.
United States v. *Lanza*, 67 L. ed. 314.

II. Federal legislation in aid of state prohibition laws prior to the 18th Amendment had removed all impediments to the enforcement of prohibition of the liquor traffic theretofore existing in the interstate commerce laws.

Adams Express Co. v. *Kentucky*, 238 U. S. 190.
Clark Distilling Co. v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326.
Seaboard Air Line v. *North Carolina*, 245 U. S. 298, 62 L. ed. 299.

United States Code annotated,
27 Sec. 121,
27 Sec. 122,
27 Sec. 123,

West Virginia v. *Adams Express Co.*, 219 Fed. 794.

III. The laws of the Federal Government enacted prior to the National Prohibition Act in aid of the state prohibition laws were not repealed by the Eighteenth Amendment and the Volstead Law, but are still in full force and effect.

Pollard v. *Com.*, (Va.) 110 S. E. 354.
Ramey v. *Grace & Co.*, 231 U. S. 703, 58 L. ed. 445.
State v. *Enoch*, 26 W. Va. 253.
State v. *Stoll*, 17 Wall. 425.
United States Code Annotated, 27 Sec. 3.
United States Code Annotated, 27 Sec. 52.
Vinson v. *County Court*, 94 W. Va. 591.
Washington v. Miller, 225 U. S. 422, 59 L. ed. 295.

IV. The Eighteenth Amendment and the National Prohibition Act prohibiting the sale and transportation of liquors except as provided for certain purposes, and giving the states concurrent power to enforce prohibition by appropriate legislation does not invalidate the prohibition laws of West Virginia, though the laws employ different definitions, regulations and penalties in aid of the Amendment.

Allen v. *Com.*, 129 Va. 723.
Christian v. *Com.*, 132 Va. 616.
Com. v. *Nickerson*, (Mass.) 128 N. E. 273.
Hazel Drug Co. v. *Wilmer* (Pa.) 131 Atl. 286.
Lowry v. *Com.*, 132 Va. 574.
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Miller v. *Com.*, 135 Va. 597.
Pollard v. *Com.*, 132 Va. 576.
Ramsey v. *State*, 250 S. W. 674.
State v *Certain Intoxicating Liquors*, 192 Iowa 629, 185 N. W. 145.
State v. *Henson*, 91 W. Va. 701.
State v. *Knosky*, 87 W. Va. 558.
State v. *Moore*, 95 W. Va. 604.

State v. *National Selright Association,* 192 Iowa 629.
United States Code Annotated, 27 Sec. 13.
Vigliotto v. *Pennsylvania,* 66 L. ed. 686.
Woods v. *Seattle,* 270 Fed. 315.

V. The laws of West Virginia, and not the National Prohibition Act are determinative of the question whether appellants as non-resident wholesale dealers in products containing ethyl alcohol may without a permit from the state Commissioner of Prohibition authorizing them so to do, transport and sell to resident dealers, their said products defined as liquors by the state law.

Adams Express Co. v. *Kentucky,* 238 U. S. 190, 59 L. ed. 1267.
Constitution of West Virginia, Art. 6, sec. 40.
Dauffer-Liederman Brewing Co. v. *United States,* 36 Fed. (2d) 568.
Hamilton v. *Rathbone,* 175 U. S. 414, 44 L. ed. 219.
Intoxicating Liquor Cases, 25 Kans. 751.
Mitchel v. *Com.,* 106 Ky. 602, 51 S. W. 17.
Shatiro v. *Lyle, Prohibition Commissioner,* 30 Fed. (2d) 971.
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Ch. 60, Art. 1, Sec. 5.

Ch. 60, Art. 1, Sec. 9.
Ch. 60, Art. 1, Sec. 11.
Ch. 60, Art. 1, Sec. 13.
Ch. 60, Art. 1, Sec. 3.
West Va. Statutes, Acts 1877, ch. 107; Acts 1913, ch. 13.

ARGUMENT.

The claim of Appellants that they have the right to transport and sell certain alcoholic products in the State of West Virginia without obtaining a permit so to do from the State Commissioner of Prohibition as required by the laws of said State seems to be predicated on the theory that Federal legislation is all controlling—that the definition of "liquors" in the Volstead Act and not that of the West Virginia statute is to be applied in this case; and that a federal permit to manufacture their alcoholic products gives them the character of legitimate articles of interstate commerce, with the consequent right to transport and sell said products in the State, notwithstanding they may be intoxicating in fact, and are denounced by the laws of said State as "liquors."

In reply to this proposition it is contended that the State under its inherent police power could regulate or prohibit the liquor traffic subject to the limitations of the interstate commerce laws; that federal legislation prior to the 18th Amendment in aid of state prohibition laws removed all impediment to the enforcement of the state laws theretofore existing in the interstate commerce laws; that the 18th Amendment and the National Prohibition Act did not repeal these laws; that the State has the power to prohibit the manufacture and traffic in intoxicating liquor by any laws and regulations it may enact, not directly in conflict with the national prohibition laws, and that the prohibition laws of West Virginia requiring the permits in question in this case is appro-

priate legislation for the enforcement of the amendment and not inconsistent with any federal legislation.

I. Under its police power the State has always had the authority to regulate or prohibit the traffic in liquors, subject to the limitations of interstate commerce laws.

Under their inherent police power, the several states had, prior to the Eighteenth Amendment, the right to regulate, restrain or prohibit the manufacture and sale of intoxicants, and, in the exercise of this power, subject to the limitations and restrictions imposed by the commerce clause of the Constitution of the United States, had power to enact any and all laws for the suppression of intemperance and the minimizing of the evils resulting from the traffic in or use of intoxicating liquors by totally prohibiting or by restricting and licensing the manufacture and sale thereof, and to make such provisions to enforce and prevent the evasion of such laws as seemed expedient to the several legislatures.

Eberle v. *Michigan*, 232 U. S. 700, 58 L. ed. 803;
Purity Extract etc. Co. v. *Lynch*, 226 U. S. 192, 57 L. ed. 184.

In the case of *United States* v. *Lanza*, 67 L. ed. 314, the court, discussing this power of the states said:

> "To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible

inference that, investing the national government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal constitution, and left her free to enact prohibitions within her limits. To be sure, the first section of the amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the states, preserve to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal constitution."

II. Federal legislation in aid of state prohibition laws prior to the 18th Amendment had removed all impediments to the enforcement of prohibition of the liquor traffic theretofore existing in the interstate commerce laws.

(a) The federal laws placing intoxicating liquors within the jurisdiction of the states and subject to their laws and divesting such liquors of any protection of the interstate commerce laws are the following:

The Wilson Original Package Law.

"All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and the same manner as though such

liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

27 USCA, section 121.

The Webb-Kenyon Law.

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

27 USCA, section 122.

The Reed Amendment.

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacremental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be

punished as aforesaid: *Provided*, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state."
27 USCA, section 123.

(b) The laws referred to above in no way affect the enforcement of Federal prohibition laws. They simply deny protection to the violators of state statutes and leave the states at liberty to enforce their own laws in their own way, unrestricted and unhampered by interstate commerce laws and regulations. This is evidenced by the fact that neither the Wilson or Webb-Kenyon law carries with it any penalty for its violation. The matter of enforcement and the provisions for penalties for violations are left exclusively with the several states.

The decision are numerous which hold that by reason of the Webb-Kenyon Act shipments that are intended by any person interested to be received, possessed, sold, or in any manner used in violation of the state law are separated from other shipments, and the protection theretofore given by the interstate commerce clause of the Federal Constitution to such shipments removed. Since, however, the Supreme Court of the United States has passed upon the effect of this act, and that, too, in a case involving the West Virginia law, we do not deem it necessary to cite extensively decisions from other jurisdiction. In the case of *James Clark Distilling Company* v. *Western Maryland R. Company*, 61 Law ed. 326, it was held:

> "Any immunity from the prohibitions of W. Va. Code 1913, Chapter 32A, as amended by laws 1915, chapter 7, section 7, laws 1915, 2d Ex. Sess., chapter 7, section 34, against the shipment from without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise

> give, was taken away by the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat., at L. 699, chap. 90 Comp. Stat. 1913, sec. 8739), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the West Virginia law."

Construing the Webb-Kenyon Act, the United States Circuit Court of Appeals, Fourth Circuit, in the case of *West Virginia* v. *Adams Express Company*, 219 Fed. 794, held as follows:

> "A state may, in view of the Webb-Kenyon Act prohibiting the transportation of intoxicating liquor from one state to another which is intended to be received, possessed, sold, or used in violation of any law of the latter state, prohibit the sale of intoxicating liquors within its limits, and provide that sales in which the delivery is to be made by a carrier shall be deemed to be in the county where they are to be delivered, so as to be entitled to enjoin the carrier from making deliveries in violation of its statute although the liquors are shipped from another state."

In arriving at this conclusion, the court through Woods, Circuit Judge, took occasion to say:

> "The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson bill liquor dealers in one state were protected in impairing or defeating the efforts of another

> state to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment from one state into another not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in any manner used in violation of the state law. This is a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor, that 'the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee,' and it expressly forbids a sale within the state. This makes the receipt or delivery have the effect of a sale, and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of state prohibition laws which it was the manifest intention of the Congress to remove."

The identical provision of the West Virginia law which the court was passing on in this case, is still a part of the prohibition laws of this state, and contained in section 4 of article 1 of said chapter 60 of the Code, the same statute in which it was contained at the time of the decision aforesaid. It makes the place of the sale of liquors when delivery is made by a common or other carrier, in the county wherein the delivery thereof is

made by such carrier. In addition, as is hereinafter pointed out, V.-d), the same provision as to the place of sale is contained in section 11 of said article 1, wherein it is made unlawful for any nonresident vendor, dealer, or other person, to sell liquors in this state in violation of the laws thereof. The decision last above referred to gives force and effect to these provisions of the law of this state, under the Webb-Kenyon Act.

> "The power of a state under the Webb-Kenyon law to forbid shipment into its territory of intoxicating liquors from other states includes the lesser power to prescribe by law the conditions under which such shipments may be allowed." *Seaboard Air Line Ry.* v. *North Carolina,* 245 U. S. 298, 62 U. S. L. ed. 299.

Justice McReynolds in his opinion in this case says:

> "For some years it has been the established policy of North Carolina, approved by popular vote and expressed and enforced by the general any many local statutes, that, except in very restricted instances, the manufacturing and sale of intoxicating liquors shall not be allowed. *Smith* v. *Southern Exp. Co.* (1914), 166 N. C. 155, 157, 82 S. E. 15.
>
> "Since our decision in *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 320, 324, * * *, it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford means by subterfuge and indirection to set such laws at naught; and that under it a state may inhibit shipments therein of

intoxicating liquors from another by a common carrier although intended for the consignee's personal use, where such use is not actually forbidden. Plainly, therefore, after that enactment nothing in the laws or constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake County a penal offense irrespective of any personal right in a consignee there to have and consume liquor of that character.

"The challenged act, instead of interposing an absolute bar against all such shipments, as it was within the power of the state to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less.

"The provisions of section 15, Act to Regulate Commerce, here relied on, were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent act Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect to them."

In *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326, the court criticized and refused to follow the holding of the court in *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, relied on by counsel (Appellants' brief p. 16) to establish the proposition that before that statute making the place of delivery the place of sale can be held applicable, there must be an *intent* to violate the laws of the State of West Virginia, saying:

"The case in this court relied upon to establish the contrary (*Adams Ex. Co.* v. *Kentucky*, 238 U. S. 190, 59 L. ed. 1267. L. R. A. 1916C, 273, 36

Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167) clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle* v. *State*, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local-option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibitions because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the test of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants 'only when liquor is intended to be used in violation of the law of the state,' and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

III. The laws of the Federal Government enacted prior to the National Prohibition Act in aid of the state prohibition laws were not repealed by the Eighteenth Amendment and the Volstead law, but are still in full force and effect.

The National Prohibition Act does not by express terms attempt to repeal either the Wilson Act, the Webb-Kenyon Act or the Reed Amendment, hence no express repeal is effected. Nor do these three enactments, or any of them, contain any provisions in conflict with, or so contrary to the provisions of the National Prohibition Act that it may be said that they are repealed by implication.

The repeal of statutes by implication is not favored by the courts, and the presumption is always against the intention to repeal where express terms are not used.

Ramey v. *W. R. Grace & Co.*, 231 U. S. 703, 58 L. ed. 445;
Vision v. *County Court*, 94 W. Va. 591.

The rule of law is well settled that to repeal a statute by implication there must be such a positive, plain and visible repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled.

State v. *Stoll*, 17 Wall. 425;
Washington v. *Miller*, 225 U. S. 422, 59 L. ed. 295;
State v. *Enoch*, 26 W. Va. 253.

Indeed, the repeal provisions of the National Prohibition Act itself make it plain that these earlier acts were not repealed but were to remain in force and effect. Such provisions, in part, read:

> "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."
>
> 27 USCA, Section 52.

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provisions of this title; * * * "
>
> 27 USCA, Section 3.

Neither the Eighteenth Amendment nor the Volstead Acts deals specifically with the subject matter of the Webb-Kenyon Act or the Reed Amendment, and it would be straining the rule of repeal by implication indeed, to say that there are any provisions in the Volstead or National Prohibition Act calling for its invocation.

The Supreme Court of Appeals of Virginia, in the case of *Pollard* v. *Commonwealth*, 110 S. E. 354, held that the provisions of the Webb-Kenyon Act were left in force by the Volstead Act, and may be taken advantage of by the state saying:

> "Under the Webb-Kenyon Act, the state had ample power to prevent the importation of intoxicating liquor from without its borders * * *. The provision of that act is still in force, and consequently may still be taken advantage of by the state. Section 39 of the prohibition act of this state is not in conflict with the Eighteenth Amendment or the Volstead Act, and is still in force."

If the Wilson law be repealed, the old original package outrage will have been restored. Then alcoholic articles, manufactured under government permits, will be under interstate commerce protection and sold openly, in defiance of any state law. Liquor, manufactured under a government permit, and the sale of which is not prohibited by state law, may be sold in bottles as original packages, and the state be helpless.

If the Webb-Kenyon law be repealed, then many concoctions, the sale of which are prohibited by certain states, will no longer be subject to the laws of the state the moment they cross the state line, as now, but only after they have passed into the hands of the consignee, and packages apparently containing liquors may not be opened or inspected by state officers so long as they are in the hands of an interstate transportation agency.

If the Reed "bone dry" law be repealed, the United States mail and other means of interstate communication and transportation will again be available for the purchase and transportation of certain alcoholic liquors or liquids, manufactured under federal permits and sold without any permit restrictions, as legitimate articles of commerce, regardless of their prohibition under the laws of the state into which they are to be imported.

IV. The Eighteenth Amendment and the National Prohibition Act prohibiting the sale and transportation of liquors except as provided for certain purposes, and giving the states concurrent power to enforce prohibition by appropriate legislation does not invalidate the prohibition laws of West Virginia, though these laws employ different definitions, regulations and penalties in aid of the Amendment.

State Laws Not Affected by National Prohibition Act.

The courts are unanimous in their decisions that the state do not derive their power to legislate concerning

prohibition from the Eighteenth Amendment, but from the residuum of the police power left them by the Federal Constitution, and that they have all the power they possessed before the adoption of the Eighteenth Amendment or the enactment of the National Prohibition Act, with the sole limitation that state laws cannot legalize that which the Federal prohibition laws prohibit. In any field not expressly covered by the Federal law the states may use their common law police power unhampered. Further, it is the unanimous opinion of the courts that existing state legislation was not suspended or superseded by the Eighteenth Amendment or the Volstead Act.

In *Woods* v. *Seattle,* 270 Fed. 315, the court held that the National Prohibition Act did not prevent the state from granting to a city police power to legislate in limitation of the sale of intoxicating liquors, and the fact that Jamaica ginger is not prohibited by the national act does not prevent the city from prohibiting such sale.

The Washington bone-dry law of 1917 absolutely prohibited the sale of Jamaica ginger and a druggist brought suit to enjoin the enforcement of this act on the ground that it transcended the powers of the state. The court, however, held that the Eighteenth Amendment and the Volstead Act were not grants of rights by the state to the National Government, but were limitations on a privilege which did not override all police power of the state. That the police power of the state is paramount where it does not authorize what the National act prohibits, and through its inherent reserve power it still has the right to prohibit but may not authorize what is forbdden by the Eghteenth Amendment or the Volstead Act.

In discussing the Eighteenth Amendment, the Supreme Court of Massachusetts in the case of *Commonwealth* v. *Nickerson,* 128 N. E. 273 held:

"The amendment does not require that the exercise of the power by congress and by the states shall be coterminous, coextensive and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the same general purposes, provided they are not in immediate and hostile collision one with the other. In instances of such collision the state legislature must yield.

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state even though congress also has exerted the power reposed in it by amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identified with that of congress. It cannot authorize that which is forbidden by congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of congress. The concurrent power of the states may differ in means adopted provided it is directed by the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because congress in performance of the duty cast upon it by the amendment has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adopted to putting into execution the inexorable mandate

against the sale of intoxicating liquors for beverage contained in section 1 of the amendment, by different definitions, regulations and penalties from those contained in the Volstead Act but in harmony therewith are valid. Existing laws of that character are not suspended or superseded by the act of congress. The fact that congress has enacted legislation governing in general the field of national prohibition does not exclude the operation of appropriate state legislation within the territory of the state. The power thus reserved to the states must be put forth in aid of the enforcement and not for the obstruction of the dominant purpose of the amendment. It must not be in direct conflict with the act of congress in the same field. Subject to these limitations growing out of the nature of our dual system of government, the power of the states is constant, vital, effective and susceptible of continuous exercise. We think that these results follow from the words of the amendment, from the implication of conclusions and of the opinion in *Rhode Island* v. *Palmer,* and from other decisions to which reference has been made."

In *Vigiotti* v. *Pennsylvania,* 66 L. ed. 686, the Supreme Court of the United States passing upon a Pennsylvania law which prohibited every sale of spirituous liquors without a state license, held:

"The Brooks Law as thus construed, does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the state supplies in the effort to make prohibition effective. That the state may by appropriate legislation, exercise

its police power to that end, was expressly provided in section 2 of the amendment, which declares that congress and the several states shall have concurrent power to enforce this article by appropriate legislation. National prohibition cases (*Rhode Island* v. *Palmer*) 253 U. S. 350, 387 64 L. ed. 946, 978, 40 Sup. Ct. Rep. 486, 588. That the Brooks Law, as construed is appropriate legislation, is likewise clear. To prohibit every sale of spirituous liquors except by licensed persons may certainly aid in preventing sales for beverage purposes of liquor containing as much as one-half of one per cent of alcohol; and that is what the Volstead Act (409) prohibits. If the Brooks Law as construed, had been enacted the day after the adoption of the amendment it would obviously have been 'appropriate legislation.' It is not less so because it was already in existence."

Other decisions in point, including those of the Supreme Court of Appeals of West Virginia and Virginia, are the following:

"The adoption of the Eighteenth Amendment to the Constitution of the United States does not deprive a state of the right to exercise its police power in the enforcement of its own public policy, so long as its legislation does not conflict with any of the provisions of the federal amendment and the laws enacted in pursuance thereof."

State v. *Moore*, 95 W. Va. 604.
State v. *Henson*, 91 W. Va. 701.

"The Eighteenth Amendment to the Constitution of the United States and the act of Congress known as the Volstead Act did not annul and supersede the prohibition law of the state."

Miller v. *Com.*, 135 Va. 597.
Pollard v. *Com.*, 132 Va. 576.
Lowry v. *Com.*, 132 Va. 574.
Allen v. *Com.*, 129 Va. 723.

"It is clearly within the police power of the state to prohibit the sale of other beverages which produce intoxication and thus affect the public health, peace and morals as it is to prohibit the sale of alcoholic beverages which also produce disastrous results when used to excess."

Christian v. *Com.*, 132 Va. 616.

"The general prohibition law enacted by Congress does not provide an exclusive remedy for the enforcement of the provisions of the eighteenth Amendment to the Constitution of the United States. By the very terms of that amendment, not only Congress but the several states are given power to enforce its provisions against the sale or manufacture of intoxicating liquor, and any state legislation in aid of that general purpose will be enforced, notwithstanding offenses may be created and punishments provided in addition to those offenses created and punishments prescribed by the general prohibition law enacted by Congress." *State* v. *Knosky*, 87 W. Va. 558.

Numerous other cases might be cited, but we think enough has been shown to establish beyond question that the states do not derive their power to legislate concerning prohibition from the Eighteenth Amendment, but from their own police power, and that the only inhibition against such legislation is that the state law cannot legalize that which the Federal prohibition law prohibits. The laws which the appellees in this proceeding seek to uphold, are in no wise in conflict with the Federal

prohibition laws, and do not attempt to legalize anything which the Eighteenth Amendment or the National Prohibition Act prohibits. They are valid laws and should be given full force and effect.

Enforcement of State Laws Not Affected by Federal Definition of Intoxicating Liquor or Federal Permits.

27 USCA, section 13, cited on p. 20 of appellant's brief, enumerates certain preparations produced or manufactured under federal permit which attempts to prevent their use as intoxicants, by providing that they shall be "unfit for use for beverage purposes" or "for intoxicating beverage purposes", and then in admission of the fact that these articles may be used as intoxicating beverages provides the same penalty for their sale for beverage purposes as the penalty imposed in the case of the sale of "liquors" in the scope of the federal definition.

Can appellants consistently maintain that West Virginia under her police power and concurrent jurisdiction in the enforcement of prohibition cannot regulate or prohibit the transportation and sale of such of these articles coming within the state's definition of liquors?

> "The fact that a company making a medicinal preparation has a permit from the Commissioner of Internal Revenue under this section (sec. 13) does not prevent the state from determining that such preparation is intoxicating, and capable of use as a beverage, and ordering it destroyed, since a state can legislate more rigorously than Congress under the Eighteenth Amendment without there being a conflict between federal and state legislation, there being no conflict as long as the state and federal acts can consistently stand together."

State v. *Certain Intoxicating Liquors*, 185 N. W. 145, 192 Iowa 629.

"A permit granted under this section does not preclude an inquiry in a prosecution under a state law into the question whether the preparation is in fact used as an intoxicating beverage."

State v. *National Selright Association Id.* 192 Iowa 629.

"Seller of flavoring extracts containing fifty per cent of alcohol under circumstances from which he could reasonably infer purchaser's intent to use it as beverage was guilty of selling intoxicating liquor for beverage purposes in violation of this section." (sec. 13.)

Massei v. *U. S.* 295 Fed. 683. Certiorari denied U. S. 592, 68 L. ed. 865.

"A United States Government permit, however, does not authorize the sale of alcohol liquors in violation of the laws of this state. Constitution U. S. Amendment Eighteen, sections 1, 2, confers concurrent power on the United States Government and several states to enforce the Eighteenth Amendment by appropriate legislation, and either state or federal government may enact laws for that purpose."

Hazel Drug Co. v. *Wilmer*, (Pa.) 131 Atl. 286.

"Although the constitution forbids the manufacture, sale, etc., of intoxicating liquor except for certain purposes, the legislature has power to impose a restrictive legislation upon the manufacture, sale, etc., of such liquors for the excepted purposes by requiring the persons who so attempt to manufacture and sell to procure a permit."

Ramey v. *State*, (Tex.) 250 S. W. 674.

V. The laws of West Virginia, and not the National Prohibition Act, are determinative of the question whether appellants as non-resident wholesale dealers in products containing ethyl alcohol may without a permit from the State Commissioner of Prohibition authorizing them so to do, transport and sell to resident dealers their said products defined as liquors by the State law.

(a) *The West Virginia laws directly applicable are as follows:*

Constitution, Article 6, Section 46:

> "On and after the first day of July, One Thousand Nine Hundred and Fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drinks, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state; provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes *may be permitted under such regulations as the legislature may prescribe.* The legislature shall, without delay, enact such laws, *with regulations, conditions, securities and penalties* as may be necessary to carry into effect the provisions of this section." (Italics ours.)

Section 1 of Article 1 of Chapter 60, Official Code of West Virginia:

> "The word 'liquors,' as used in this chapter, shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any

other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this statute; *and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication,* and all beverages containing one-half of one per cent or more of alcohol by volume, shall be deemed spirituous liquors, and shall be embraced in the word 'liquors,' as used in this statute." (Italics ours.)

Section 4 of Article 1 of Chapter 60, Official Code:

"Except as hereinafter provided, if any person acting for himself, or by, or through another, shall sell, keep, store, offer, or expose for sale, or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor * * *. And in case of sale in which a shipment or delivery of such liquor is made by a common or other carrier the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

Section 5 of Article 1 of Chapter 60, Official Code:

"The provisions of this chapter shall not be construed to prevent * * * the sale and keeping and storing for sale by druggists of wine for sacramental purposes by religious bodies, or any United States Pharmacopoeia or national formulary preparation in conformity with the West Virginia Prarmacy Law, or any preparation which is exempted by the provisions of the national pure food law; * * * provided, that no one shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in sec-

tion 1 of this article and as herein excepted, without first obtaining a permit from the Commissioner of Prohibition so to do. * * *

"(a) All manufacturers of liquors and wholesale dealers therein shall pay a fee of $50.00 for each permit; (b) All purchasers in wholesale quantities of ethyl alcohol in any form, whether pure, medicated, or denatured, for use as herein provided, shall pay a fee of $10.00 for each permit; (c) All purchasers in wholesale quantities of liquors as defined in section 1 of this article for sale at retail, except duly licensed druggists, shall pay a fee of $2.00 for each permit. * * *

"Permits shall be issued for the calendar year and shall expire on the 31st day of December following the issuance thereof. * * * Provided, further, that such liquors shall be manufactured, sold, kept for sale, transported and used under permits issued by the Federal Prohibition Commissioner and in accordance with the regulations issued in pursuance of the national prohibition act."

Section 9 of Article 1 of Chapter 60, Official Code:

"Common carriers are forbidden to carry liquors into the state or from one place to another within the state, "except a common carrier may, for hire, carry pure grain alcohol and wine and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five of this article."

Section 11 of Article 1 of Chapter 60, Official Code:

"It shall be unlawful for any non-resident vendor, dealer or other person to sell or furnish any malt, brewed, vinous or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not, and wheth-

er intoxicating or not, to any person, corporation or firm within the territory of this state, when such liquors, mixtures, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition law of this state; and in case of such sale or furnishing in which a shipment or delivery of such liquor is made by a common or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

Section 13 of Article 1 of Chapter 60, Official Code:

"It is unlawful for any person in this state to receive or possess liquors received directly or indirectly from a common or other carrier. "Provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in section five of this article and section three, article two of this chapter."

Section 3 of Article 2 of Chapter 60, Official Code:

"The manufacture of alcohol, wine, and other liquors, and the sale of the same by the manufacturers, by wholesale druggists and other dealers shall be under the supervision of the Commissioner and under such rules and regulations as he may from time to time prescribe."

(b) *Meaning of, and effect to be given Prohibition Laws of West Virginia.*

Referring first to Section 4 of Article 1 of Chapter 60 of the Code, as above quoted, it will be observed that

this Section makes it unlawful, "except as hereinatfer provided," to sell, keep, store, offer, or expose for sale, or receive orders for any liquors, and that in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee. The exception provided for in this statute, applicable to this case, is found in Section 5 of said Article 1 of Chapter 60, which, after withdrawing from the provisions of said Chapter 60 the sale and keeping and storing for sale of any United States Pharmacopoeia or national formulary preparation in conformity with the West Virginia Pharmacy Law, or any preparation which is exempted by the provisions of the national pure food law contains the proviso that no one shall manufacture, sell, keep for sale, purchase or transport any liquors, *as defined in Section 1 of this article, and as herein excepted*, without obtaining a permit from the Commissioner of Prohibition so to do, and fixes the amount to be paid for such permit.

To ascertain what is meant by the word "liquors," as used in both of said Sections 4 and 5, we turn to Section 1 or Article 1 of said Chapter 60, wherein, among other things, it is provided that "all liquids, mixtures or preparations, whether patented or not, which will produce intoxication," shall be deemed spirituous liquors, and shall be embraced in the word "liquors" as used in this chapter. So, reading Sections 1, 4 and 5 together, it is clear that the sale of liquids, mixtures or preparations, whether patented or not, which will produce intoxication, without first obtaining a permit from the Commissioner of Prohibition so to do, is unlawful, and that where shipment or delivery of such liquids, mixtures or prepara-

tions is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier.

This definition of liquors as set out in said Section 1 was written upon the statute books of this state as a part of the law forbidding the sale of intoxicating liquors without a license therefor, long prior to the adoption of the constitutional amendment forbidding the sale of intoxicating liquors, and its enactment into law as a part of Chapter 13 of the Acts of 1913 pursuant to said constitutional amendment. By Chapter 107 of the Acts of 1877 it was provided that "no person without a license therefor shall * * * sell, offer or expose for sale, spirituous liquors, wine, porter, ale or beer, of any drink of like nature. And all mixtures or preparations known as "bitters" or otherwise, which will produce intoxication, whether they be patented or not, shall be deemed spirituous liquors within the meaning of this Section." By Chapter 29 of the Acts of 1885, the word "liquid" was added after the word "preparation," and from that time up to the enactment of the present statute in 1913, "liquors" was defined as follows: "And all mixtures, preparations or liquids, known as 'bitters' or otherwise, which will produce intoxication, whether they be patented or not, shall be deemed spirituous liquors within the meaning of this section."

(c) *Decisions of State Court Based upon Statutory Definition of Liquors.*

In *State* v. *Muncey*, 28 W. Va. 494, conviction for sale of essence of cinnamon without a state license for the sale of intoxicating liquors was sustained. In its opinion, the court, after quoting definitions of "essence" and "Cinnamon" as given by Webster, said:

> "Take whichever of these definitions we may of the words 'essence' and connect it with the word 'cinnamon' and the necessary conclusion is that the 'essence' and the necessary conclusion is that the 'essence of cinnamon' is a 'preparation or mixture.' It is immaterial what are the ingredients of the preparation or mixture, or by what name it is known, or whether it is patented or not, if it will produce intoxication the sale of it is prohibited by the statute. The 'essence of cinnamon' then, being a preparation or mixture, the only question for this court to decide in this case is, whether or not the evidence was sufficient to warrant the jury in finding that it would produce intoxication, or rather whether the jury, upon any reasonable view of, or deductions from the evidence certified, was justified in finding that the particular 'essence of cinnamon' sold by the defendant in this case did produce intoxication. If we can not judically know that the 'essence of cinnamon' may produce intoxication, we certainly can not judicially know that it may not do so. The question, therefore, is one of fact purely."

In *State* v. *Durr*, 69 W. Va. 251, it was held that as to drinks not mentioned in the statute, the intoxicating quality was the test, the court saying:

> "* * * in 1885, the section was amended by inserting the word 'liquids' in addition to 'mixtures' and 'preparations,' and now cider would be a liquid, and, if strong enough to produce intoxication, would be, in law, deemed spirituous liquor, and evidence to prove and disprove its intoxicating properties would be admissible."

In *State* v. *Good*, 56 W. Va. 215, defendant was indicted for making sale of an intoxicating liquid called "rikk"

and it was urged on his behalf that the article sold was not in fact one of prohibited liquors mentioned in the indictment, namely spirituous liquors, wine, porter, ale, beer and drinks of like nature. The court, as shown by point 1 of the syllabus, held:

> "Proof of an unlawful sale of a mixture, preparation or liquid 'which will produce intoxication' will sustain a conviction upon an indictment charging the unlawful sale of 'spirituous liquors, wine, porter, ale, beer, and drinks of like nature' without a state license therefor. For the purposes of chapter 32 of the code of 1899 such mixture, preparation or liquid is, in law, spirituous liquor, whether it be such, in fact or not."

In *State* v. *Henry*, 74 W. Va. 72, under an indictment charging the sale, without a license therefor, of "spirituous liquors, wines, porter, ale, beer, and drinks of a like nature," and the statutory provision (Code 1906, chap. 32, sec. 1) providing that "all mixtures, preparations, or liquids which will produce *intoxication*, whether they are patented or not," should "be deemed spirituous liquors within the meaning of this section," it was held that the only question which could be fairly presented to the jury was whether the liquor sold would produce intoxication, in the ordinary and common acceptation of the word, when drunk in sufficient quantities. This question, it was held, was fully and fairly presented to the jury by the following instruction: "The court instructs the jury that, in order to make any fluid or liquid an intoxicating drink, it must be capable of producing intoxication, in the usual sense and common acceptation of the term intoxication; that is, it must have in it a sufficient amount of alcohol to produce intoxication when consumed in sufficient quantities."

In each of these cases the question involved was whether a conviction for the sale of a liquid or preparation not specifically named in the statute forbidding the sale of intoxicating liquors without a state license therefor, should be upheld or set aside, and the guiding principle in the determination of this question was whether the liquid was capable of producing intoxication. This was the polestar from which the court never deviated, and when it was found that the liquid so sold without a license was in fact intoxicating, the court unhesitatingly affirmed the conviction.

(d) *State Laws Prohibit Sale of Liquors Transported into the State from another except under permit from State Commissioner of Prohibition.*

It is self evident, and requires no argument to show that the construction to the definition of liquors under a law which prohibited their sale without a license should be given to the definition when written into a law which prohibits the sale of the liquors without a permit. If under the license law, mixtures, preparations or liquids, known as "bitters" or otherwise, which will produce intoxication, could not be sold without a license, it would follow that "all mixtures, preparations or liquids which will produce intoxication" may not be sold under the existing law without a permit from the Commissioner."

Likewise, if, as we have already shown, a permit is required for the sale thereof, Section 11 of Article 1 of said Chapter 60 is complete within itself in making it unlawful for non-resident vendors or dealers to sell liquors in this state without such permit. This section makes it unlawful for any non-resident vendor, dealer or other person to sell or furnish liquors to any person in the state, when the same is to be received, possessed, *sold*, or in any manner used in violation of the prohibi-

tion laws of this state, and when delivery is to be made by a common or other carrier, makes the place of delivery the place of sale. When, therefore, the appellants as non-resident dealers or vendors sell their products in this state and deliver same by a common or other cerrier, this statute fixes the place of sale at the place of delivery. The products are not sold until they arrive in the state at the place of delivery, when they are then sold by hte appellants to the purchaser; which sale constitutes one within the state, for which a permit is required, and if the sale be made without such permit, it is made in violation of the prohibition laws of this state, and becomes an unlawful sale, to which a penalty is attached by this section. In other words, the products when shipped into West Virginia are still the property of the non-resident vendors when they reach the place of delivery and until a sale is made by said vendors. If, when such sale is made, the vendors do not have a permit for their sale as required by said Section 5 of Article 1, they are an interested party making a sale in the State of West Virginia in violation of the law, a transaction which the statute forbids. It will not do to say that when non-resident vendors take orders for, and transport into this state liquors, that they are not "interested" in said liquors, within the meaning of that term as used in our statute prohibiting liquors so transported to be sold by any person interested therein, up to the time of its delivery to the consignee. Until such delivery such liquors have not yet been sold in the State of West Virginia. Any loss thereof in transit would be borne by the vendor or dealer so making the shipment. It is his liquor until the time it is delivered to the consignee, at which time he becomes the seller in the State of West Virginia, and the consignee becomes the purchaser.

By the constitutional provision prohibiting the sale of liquor in this state, it is provided that the manufacture

and sale and keeping for sale of certain liquors may be permitted under such regulations as the legislature may prescribe, and that the legislature shall enact such laws, with regulations, conditions, securities, and penalties as may be necessary to carry into effect the provisions of the constitution. Pursuant to this authority the legislature, by Section 3 of Article 2 of Chapter 60 of the Code, has clothed the Commissioner of Prohibition with supervision over the manufacture of alcohol, wine, and other liquor, and the sale of same by the manufacturer, wholesale druggist and other dealers, and placed the same under such rules and regulations as he may from time to time prescribe. Under this authority the Commissioner of Prohibition has promulgated certain "Rules and Regulations" a copy of which is filed with and made a part of the answer of appellees, in which, among other things, manufacturers and dealers authorized to sell liquors are defined, a permit required for those who sell to retail dealers, as well as for such retail dealers to sell liquors, and requiring such permit from all dealers for all liquids, mixtures and preparations containing so much as one-half of one per cent of alcohol and not specifically excepted under Section 4, unless such liquors are shown to be sufficiently denatured or medicated as to be *non-potable*. The "Fourteenth" rule contained in said Rules and Regulations provides that "the latest prohibition department ruling, which is published separate from these rules and regulations, is made a part of these rules and regulations." Pursuant to this rule, the Commissioner of Prohibition has issued "Ruling No. 5," effective January 1, 1931, a copy of which is filed as an exhibit with appellants' bill, in which is classified and listed, (A) liquors the sale of which is prohibited in this state and for which no permit will be issued; (B) liquors to be sold by the drug trade only under permit; (C) liquors which may be sold by all dealers under permit, and

(D) liquors which may be sold by all dealers without permit.

These rules and regulations are designed for the enforcement of the prohibition laws of this state. They do not conflict with any statutory law, but to the contrary are in harmony with and based upon such statutes. By paragraph (7) of Section 4 of Title 27 of the U. S. Code, it is provided that, "'the term 'regulation' shall mean any regulation prescribed by the Commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this title, and the Commissioner is authorized to make such regulations.'" The Federal Courts have held that regulations of department of government reasonably adopted to enforce Act of Congress, administration of which is confided to this department, have the force and effect of law where not in conflict with the express statutory provision. *Dauffer-Liederman Brewing Company* v. *United States,* 36 F. (2nd) 568; *Shatiro* v. *Lyle, Prohibition Administrator,* 30 F. (2nd) 971. We respectfully submit that the same force and effect should be given to the rules and regulations of the Prohibition Commissioner of this state, and that the reasonable rules and regulations promulgated by him when not in conflict with any statutory provision should be upheld.

(e) *Rule "in Pari Materia" not Applicable as Between National Prohibition Act and Earlier Federal Laws.*

To substantiate their contention that appellants' products are not intoxicating liquors within the meaning of the federal statutes pertaining to the interstate transportation of intoxicating liquors, counsel for appellants say that "The term 'intoxicating liquors' as used in the

Federal statutes enacted prior to the passage of the Volstead Act must be defined in the light of the definition as used by Congress in the Volstead Act."

In aid of this proposition, counsel invoke the rule that "All consistent statutes that can stand together though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as consisting one act."

Such rule, however, has no application as between the Webb-Kenyon Act and the Volstead Law. These acts do not relate to the same subject. The former had for its purpose the withdrawing of the protection which might otherwise be given to intoxicating liquor transported from one state to another, when such liquor was intended to be received, possessed, sold or used in violation of the laws of the state into which transported, and was in aid of State enforcement. The latter act dealt with an entirely different subject, that of prohibiting the manufacture, sale, etc., of liquors as defined by the Act, and dealt with National enforcement. They are not Acts relating to the same subject so as to render them in pari materia, and bring them within the rule governing such statute, the object of which is to ascertain and carry into effect the intention of the law making body, and which proceeds on the supposition that the several statutes relating to one subject are governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions.

Again, the rule in pari materia is applicable only when the terms of the statute to be construed are ambiguous or its significance is doubtful. In *Hamilton* v. *Rathbone*, 175, U. S. 414, 44 L. ed. 219. There is no such imbiguity or doubtful significance in the provisions of the Webb-Kenyon Act as makes it unnecessary to revert to the Volstead Act in its interpretation.

(f) *Rule Enunciated By Courts in Some of the Earlier Cases not Applicable in Determining what Constitutes Intoxicating Liquors Under Modern Conditions.*

To further substantiate their contention, that appellants' products are not "intoxicating liquors" within the meaning of the Federal statutes pertaining to the interstate transportation of intoxicating liquors, counsel for appellants (page 21, Brief) rely on the holding of the court in the Intoxicating Liquor cases, 25 Kansas 751, decided in 1881, that a statute which provided that "All liquors mentioned in section one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of the act," did not embrace cologne, extract of lemon, bay rum, paregoric, tincture of gentian and many other medicinal preparations containing alcohol, because they were seldom used as beverages, and that the court would take judicial notice of the uses and character of such articles.

This case was decided in 1881. Since that time and within the last few years, the use of preparations as—or as an equivalent substitute for, intoxicating beverages, has materially changed, to the extent that many mixtures and liquids formerly seldom used as intoxicants are now commonly used as such. If the court, as it did when these cases were decided, could take judicial notice that extract of lemon, bay rum and other similar preparations were seldom used for intoxicating purposes, it would seem that, on the same principle, it can now say that they are now often used as, or, as an equivalent substitute for such purposes. Such reasoning is not without judicial sanction. In *State* v. *Intoxicating Liquors and Vessels*, 106 Atl. 711, decided in 1919, the Maine Supreme Judicial Court, in holding that Jamaica ginger manufactured for flavoring and medicinal purposes, and containing

from 28 to 90 per cent of alcohol, was within a statute forbidding the sale of intoxicating liquors of whatever origin, discussing some of the earlier cases, said:

> "It will be observed that in all earlier cases cited the courts were not dealing with Jamaica ginger. * * * It is a matter of common knowledge, in which all courts share, a knowledge antedating recent legislation or agitation, that for years Jamaica ginger, whatever its merits may be, has been used as a substitute for other intoxicants."

In *Mitchell* v. *Com.* 106 Ky. 602, 51 S. W. 17, the defendant was charged with selling Jamacia ginger, and there was evidence that it contained about 96 per cent of alcohol. The court said:

> "Moreover, we think that, without the druggist's evidence, it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whiskey."

In a later Kansas case, *State* v. *Miller*, 92 Kans. 994, decided in 1914, the court construed the Kansas law of 1909, which made it unlawful for "Any person or persons who shall manufacture, sell or barter any spirituous malt, vinous, fermented or *other intoxicating liquors*," a statute very similar to that on which the decision of the Kansas Liquor Cases, 1881, was based, as prohibiting the sale of Jamaica ginger. Stating that such preparation was, in the United States Dispensatory, classed with those of lemon, vanilla, cinnamon, cloves, camphor, cologne, paregoric, peppermint, wintergreen, and many

others, the court, per Burch, Judge, answering the contention of defendant that the statute should be given the construction as placed upon the one in force in 1881, said:

> "In the case of *State* v. *Ross*, 86 Kan. 799, 121 Pac. 909, an interpretation given the act of 1881 by a decision rendered in 1887 was pressed upon the court. In response it was said: 'The legislature has traveled very far since that statute was enacted and that case was decided, and a person would make a great mistake to rest conduct upon the liquor law as it then stood. The schemes and shifts and devices to evade the law have been so numerous and cunning, and the social benefits hoped for from regulation of the liquor traffic have been so persistently circumvented, that the legislature has felt it necessary again and again to call upon the people to make personal forbearance in the interest of what has been esteemed the general welfare.'"
>
> "One of the perfectly natural and inevitable consequences of the strict enforcement of the prohibitory law was that persons with alcoholic addictions and others desiring the stimulating effect of alcohol should turn to the nearest substitutes for the usual intoxicating agents. In 1881 it was known that persons would use bay rum for purpose of intoxication. *Intoxicating Liquor Cases*, 25 Kan. 751, 762, 37 Am. Rep. 284. *Extract of Lemon* has been used for the same purpose with success. *Holcomb* v. *People*, 49 Ill. App. 73. The same is true of essence of cinnamon. (*State* v. *Muncey*, 28 W. Va. 494), and Jamaica ginger cases are common in the books. . . .
>
> "It will not be assumed that the legislature was ignorant of the fact that persons deprived of their usual stimulants would resort to substitutes, or that dealers with an eye to profit would

supply customers desiring stimulants with fair substitutes. * * *

"The progress of events had been such, when the legislature approached a revision of the law of 1909, that the intellectual, moral, social, and legal atmosphere had become a wholly different medium from that in which the legislature of 1881 labored. If in the act of 1909, which cut off the sale of intoxicating liquors for even medicinal purposes, the legislature had inserted the following definition: All liquors mentioned in Sec. 1 of this act, and all other liquors or mixtures thereof, by whatever name called, which will produce intoxication, shall be considered and held to be intoxicating liquors, * * * no one would have regarded the language as unfortunately chosen, or as tending to produce prejudice against the law, or as unnecessary or unreasonable because reaching culinary, toilet or medicinal preparations in fact intoxicating and used as substitutes for whiskey. The spirit and internal sense of the law would have been regarded as identical with the ordinary and popular signification of the plain words. The suggested definition is precisely the one contained in the law of 1881."

Cases might be cited from other jurisdictions holding that statutes similar to the West Virginia statute, which makes "all mixtures, preparations or liquids, known as 'bitters' or otherwise, which will produce intoxication, whether they be patented or not," spirituous liquors, embrace those preparations or liquids which are intoxicating in fact, but such further citations are deemed unnecessary for the reasons:

First: Because, as hereinbefore shown (V.-d), the court of last resort in West Virginia has construed the

statutory definition of intoxicating liquors to include any fluid or liquid capable of producing intoxication.

Second: Federal courts are bound by the decision of a state court of last resort construing a statute relating to the sale or use of intoxicating liquors within the state. *Adams Express Co.* v. *Kenucky*, 238 U. S. 190, 59 Law Ed. 1267; *Van Oster* v. *Kansas*, 71 Law Ed. 354.

It is respectfully submitted that state legislation relative to intoxicating liquors is not invalid so long as it does not attempt to authorize what the Federal amendment and the National Prohibition Act prohibit; that the laws of the state requiring a permit of dealers, resident or non-resident, for the sale of liquors are valid; that the right of the Commissioner of Prohibition to require such permit thereunder is not superseded or in any way affected by the fact that such dealers hold a permit from the Federal Government; that the laws of the State of West Virginia called into question by this proceeding are valid existing laws; that the Commissioner of Prohibition in requiring a permit from the plaintiff for the sale of the products in question has not exceeded his authority in the enforcement of said laws, and that the decree of the District Court should be affirmed.

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April 19, 1932.